**IN THE SUPREME COURT OF FLORIDA**
**CASE NOS. SC16-8 & SC16-56**

**CARY MICHAEL LAMBRIX,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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**CARY MICHAEL LAMBRIX,**

**Petitioner,**

**v.**

**JULIE L. JONES, etc.**

**Respondents.**
_____/

**MOTION FOR SUPPLEMENTAL BRIEFING ON HARMLESS ERROR AFTER THIS COURT HAS DEFINED *HURST* ERROR**

**COMES NOW** the Appellant/Petitioner, **CARY MICHAEL LAMBRIX,** by and through counsel, and herein files this motion for supplemental briefing in the above-entitled cases on the issue of harmless error after this Court determines what *Hurst* error is exactly. As grounds therefore, Mr. Lambrix states:

1. Following this issuance of *Hurst v.* Florida, 136 S. Ct. 616 (2016), this Court issued an order directing Respondent to file a response to the pending habeas

petition and address the applicability of *Hurst*, its retroactivity, and whether any *Hurst* error in Mr. Lambrix's case was harmless. In accord with this Court, the response was filed on January 15, 2016. On January 22, 2016, Mr. Lambrix filed his reply to the response and did attempt to address the issue of harmless error. On January 27, 2016, Mr. Lambrix filed a motion to supplement his reply to the State's response to his petition for writ of habeas corpus. On January 28, 2016, this Court granted the motion and ordered the pleadings to be supplemented with the motion and its attachments. On February 2, 2016, this Court heard oral arguments from the parties as to Mr. Lambrix's claims regarding *Hurst v. Florida*, 136 S. Ct. 616 (2016). Later on February 2, 2016, this Court issued a stay of Mr. Lambrix's execution.

2. Besides the oral argument in Mr. Lambrix's case on February 2, 2016, this Court heard oral arguments in at least four other capital cases on February 2, 3, and 4, 2016, in which the implications of *Hurst* was discussed at length. During these oral arguments, this significance of the decision in *Hurst* was the subject of considerable debate. Attorneys for the State maintained over the course of the five oral arguments that *Hurst* only meant that a Florida jury needed to find the presence of one aggravating circumstance.[1] Counsel for the State advanced this argument

[1] Counsel for the State seemed to analyze Florida's statute under case law predating *Hurst* that failed to recognize that the Arizona statute at issue in *Ring v. Arizona*, 536 U.S. 584 (2002), specifically provided that a death sentence was authorized once a judge had found the presence of one aggravating circumstance. Florida statutes require that before a death sentence may be imposed the sentencing judge has to find

even though the United States Supreme Court in *Hurst* wrote:

> The **Florida** sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." **Fla**. Stat. § 775.082(1) (emphasis added). The trial court *alone* must find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see *Steele*, 921 So. 2d, at 546.

*Hurst v. Florida*, 136 S. Ct. at 622.

3. In his oral argument, Mr. Lambrix argued that the plain language of *Hurst* meant that the statutorily defined facts for death eligibility were: 1) the existence of "sufficient aggravating circumstances;" and 2) the absence of sufficient mitigating circumstances to outweigh the aggravating circumstances. *Hurst* held the Florida sentencing scheme "unconstitutional" because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.

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as a matter of fact: 1) the existence of sufficient aggravating circumstances, and 2) the absence of sufficient mitigating circumstances that outweigh the aggravating circumstances. Certainly before *Hurst v. Florida* issued and identified the statutorily defined facts necessary under Florida law to authorize the imposition of a death sentence, this Court in its analysis of *Ring* claims used the language of *Ring*—that was based upon Arizona's statutory scheme—in the discussion of *Ring's* applicability to Florida's capital sentencing scheme. This Court's conclusion that *Ring* was inapplicable to Florida because it believed that *Hildwin v. Florida*, 490 U.S. 638 (1989), had survived *Ring* meant statements from this Court treating the one aggravating circumstance language contained in *Ring* and premised upon Arizona statutory law as governing Sixth Amendment law was dicta. This Court's dicta regarding *Ring*, a case it found inapplicable to Florida, did not and could not change Florida's statutory law identifying the facts that a judge must find before a capital defendant could be sentenced to death.

A jury's mere recommendation is not enough." 136 S. Ct. at 619. Thus, Mr. Lambrix also argued that *Hurst* identified structural error not subject to harmless error analysis. Counsel for the other death sentenced defendants also relied upon the statutory language quoted in *Hurst* that identifies "the facts" that must be found before a capital defendant can receive a death sentence.

4. During the five oral arguments that this Court heard last week in which the meaning of *Hurst v. Florida* was pondered, the parties did not agree as to what constitutes *Hurst* error. In contemplating the divergent views of *Hurst* on display in those oral arguments, it has become apparent to undersigned counsel that any meaningful discussion of harmless error in any particular case can only follow once there has been a judicial determination of what constitutes *Hurst* error, i.e. what statutorily defined facts must be determined by a jury in accord with the Sixth Amendment. Due process guarantees Mr. Lambrix the opportunity to be meaningfully heard; but here without knowing which of the markedly different views of what constitutes *Hurst* error is accepted by this Court, Mr. Lambrix cannot meaningful address whether any *Hurst* error in his case is harmless or can ever be harmless.

5. A number of this Court's justices expressed frustration with the *Hurst* opinion and indicated that they found the language in the opinion less than clear as to what constitutes *Hurst* error. Though Mr. Lambrix believes that his arguments to

this Court regarding *Hurst* and what constitutes *Hurst* error are correct, the confusion regarding *Hurst* expressed by members of this Court and the stingy reading of *Hurst* advocated by representatives of the State has led Mr. Lambrix to file this motion seeking to have the opportunity to address the question of harmless error after this Court has identified what constitutes *Hurst* error, i.e. what statutorily defined facts were required to be found by a jury. Whether *Hurst* error is structural in nature, and if not structural, whether it is harmless beyond a reasonable doubt in any particular case is dependent on what this Court determines *Hurst* error to be.

6. How this Court ultimately reads *Hurst* and what statutorily defined facts *Hurst* requires to be made by juries will greatly affect what if any harmless error analysis is available and whether in any particular case *Hurst* error can ever be found to be harmless beyond a reasonable doubt. It is not possible to envision how a *Hurst*-compliant trial result might have been different without first knowing what a *Hurst*-compliant trial looks like. What facts does *Hurst* require a jury to find before a death sentence is authorized under Florida law? The State and Mr. Lambrix have very different understandings of the answer to this question. Without knowing the answer to that question, any discussion of the availability of harmless error or its application to some undefined error is the equivalent of speculation as to the number of angels that can dance on the head of a pin.

7. It is not even a matter of just knowing what statutorily defined facts

must be resolved by a Florida jury, any meaningful discussion of the availability of harmless error requires this Court to determine whether the jury's finding of the statutorily defined fact or facts must be rendered unanimously, what must the jury be instructed as to significance of its verdict under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and whether evidence may be presented to demonstrate the manner in which pre-*Hurst* affected trial counsel's strategic choices. Mr. Lambrix cannot be meaningfully heard on the availability of harmless error and whether the *Hurst* error in his case can be found harmless beyond a reasonable doubt until this Court resolves the threshold questions of what *Hurst* error is and what a proceeding free of *Hurst* error looks like.

8. Mr. Lambrix recognizes that the issue of the availability of harmless error was mentioned in *Hurst* but not reached by the Supreme Court:

> Finally, we do not reach the State's assertion that any error was harmless. *See Neder v. United States*, 527 U.S. 1, 18–19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (holding that **the failure to submit an uncontested element of an offense to a jury may be harmless**). This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here. *See Ring*, 536 U.S., at 609, n.7, 122 S. Ct. 2428.

*Hurst v. Florida*, 136 S. Ct. 616, 624 (2016) (emphasis added). Obviously, the Supreme Court in *Hurst* left the State's assertion that any error was harmless for this Court to address in the first instance. In so doing though, the Supreme Court referred this Court to *Neder v. United States*. Looking to *Neder*, there the Supreme Court

wrote:

> The error at issue here—a jury instruction that omits an element of the offense—differs markedly from the constitutional violations we have found to defy harmless-error review. Those cases, we have explained, contain a "**defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself**." *Fulminante, supra,*at 310, 111 S.Ct. 1246. Such errors "infect the entire trial process," *Brecht v. Abrahamson,* 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), and "necessarily render a trial fundamentally unfair," *Rose,* 478 U.S., at 577, 106 S.Ct. 3101. Put another way, these errors deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair." *Id.,* at 577–578, 106 S.Ct. 3101.
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> Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Our decision in *Johnson v. United States, supra,* is instructive. *Johnson* was a perjury prosecution in which, as here, the element of materiality was decided by the judge rather than submitted to the jury. The defendant failed to object at trial, and we thus reviewed her claim for "plain error." Although reserving the question whether the omission of an element *ipso facto* "'affect[s] substantial rights,'" 520 U.S., at 468–469, 117 S.Ct. 1544, we concluded that the error did not warrant correction in light of the "'overwhelming'" and "uncontroverted" evidence supporting materiality, *id.,* at 470, 117 S.Ct. 1544.
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> The conclusion that the omission of an element is subject to harmless-error analysis is consistent with the holding (if not the entire reasoning) of *Sullivan v. Louisiana,* the case

upon which Neder principally relies. In *Sullivan,* the trial court gave the jury a defective "reasonable doubt" instruction in violation of the defendant's Fifth and Sixth Amendment rights to have the charged offense proved beyond a reasonable doubt. See *Cage v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) *(per curiam).*Applying our traditional mode of analysis, the Court concluded that the error was not subject to harmless-error analysis because it "vitiates *all* the jury's findings," 508 U.S., at 281, 113 S.Ct. 2078, and produces "consequences that are necessarily unquantifiable and indeterminate," *id.,* at 282, 113 S.Ct. 2078. By contrast, the jury-instruction error here did not "vitiat[e] *all* the jury's findings." *Id.,*at 281, 113 S.Ct. 2078; see *id.,* at 284, 113 S.Ct. 2078 (REHNQUIST, C. J., concurring). It did, of course, prevent the jury from making a finding on the element of materiality.

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It would not be illogical to extend the reasoning of *Sullivan* from a defective "reasonable doubt" instruction to a failure to instruct on an element of the crime. But, as indicated in the foregoing discussion, the matter is not *res nova* under our case law. And if the life of the law has not been logic but experience, see O. Holmes, The Common Law 1 (1881), we are entitled to stand back and see what would be accomplished by such an extension in this case. The omitted element was materiality. Petitioner underreported $5 million on his tax returns, and did not contest the element of materiality at trial. **Petitioner does not suggest that he would introduce any evidence bearing upon the issue of materiality if so allowed. Reversal without any consideration of the effect of the error upon the verdict would send the case back for retrial—a retrial not focused at all on the issue of materiality, but on contested issues on which the jury was properly instructed.** We do not think the Sixth Amendment requires us to veer away from settled precedent to reach such a result.

*Neder*, 527 U.S. at 8-9, 10-11, 15 (emphasis added).

9. To determine under *Neder* whether *Hurst* error is subject to harmless error analysis requires a definitive answer to what exactly is *Hurst* error. Unlike the circumstances in *Neder*, the element at issue under *Hurst* is the element that separates first degree murder and a life sentence from capital first degree murder and a death sentence. Unlike the circumstances in *Neder* where the presence of the element was not contested, Mr. Lambrix did contest whether he should be sentenced to death and would contest it again in a new proceeding. Moreover a reversal in Mr. Lambrix's case on the basis of *Hurst* would not result in a retrial of his guilt. It would either require the imposition of a life sentence on the basis of double jeopardy or a remand for a new proceeding to determine whether the State could now prove the statutorily defined facts necessary to authorize the imposition of a death sentence, and Mr. Lambrix would contest the existence of those facts.

10. It would also make no sense for the Florida judiciary to seek to cure its prior denial of jury participation through another denial of jury participation. In *Hurst* at a minimum, the problem was *that judges rather than juries were finding facts necessary to authorize a death sentence*. Seeking to remedy that error by having appellate judges, rather than trial judges, once again supplant the judgment of the jury would be to repeat the same error. The only reason the Supreme Court in *Clemons v. Mississippi*, 494 U.S. 738 (1990), permitted appellate courts to reweigh

aggravators and mitigators after striking an aggravator was its conclusion that the Sixth Amendment was not at issue: "in a State like Georgia, where aggravating circumstances serve only to make a defendant eligible for the death penalty and not to determine the punishment, the invalidation of one aggravating circumstance does not necessarily require an appellate court to vacate a death sentence and remand to a jury." *Clemons*, 494 U.S. at 744-45. The Supreme Court in *Clemons* then expressly relied on *Hildwin v. Florida*, 490 U.S. 638 (1989): "Likewise, the Sixth Amendment does not require that a jury specify the aggravating factors that permit the imposition of capital punishment, *Hildwin v. Florida,* 490 U.S. 638, 109 S. Ct. 2055, 104 L.Ed.2d 728 (1989)." *Clemons*, 494 U.S. at 746. *See Hurst*, 136 S. Ct. at 624 ("Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty."). With the underlying reasoning of *Clemons* wiped away in *Hurst*, this Court cannot rely on *Clemons* to justify a harmless error analysis that is little more than an appellate court reweighing of whatever aggravators the court might imagine a jury to have found. Guessing at what might have happened had the jury made the necessary factual determination is just the sort of "frail conjecture" that *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980), forbids. It would rest on the barest of speculations, on nothing more than a fantasized set of facts.

11. The reality is that until now Florida law has not required "the advisory jury" to identify what it found when a majority of the jury voted to advise the judge of a death recommendation. In Mr. Lambrix's case, we don't know what aggravating circumstances the jury considered when it determined by a majority vote whether sufficient aggravating circumstances existed to justify the imposition of a death sentence and we don't know what mitigating circumstances were considered when by a majority vote the jury concluded the mitigating circumstances were insufficient to outweigh the aggravating circumstances. Without knowing what precisely the error under *Hurst* was, and without knowing what the advisory jury found by a majority vote, it is hardly possible to determine whether the same findings would have been made by the jury had *Hurst* error not been present.

12. This Court's prior precedents may provide some illumination once this Court determines what exactly *Hurst* error is. For example, there are the many cases in which this Court reversed death sentences that rested on only one aggravating circumstance. While this Court often cited proportionality when vacating these one aggravator death sentences,[2] the fact of the matter is one aggravating circumstance

2 This Court's proportionality review is necessary to insure that Florida's capital sentencing scheme sufficiently narrows the class of defendants who are eligible for the death penalty. *Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.' *Atkins, supra*, at 319, 122 S.Ct. 2242.") (emphasis added); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) ("Though the death penalty is not invariably

has routinely been found by this Court to be an insufficient basis for the imposition of a death sentence. In 31 cases where this Court reversed a death sentence because only one valid aggravator was present, there were 19 cases in which the one valid aggravator present was either the prior violent felony aggravator or the in the course of a felony aggravator. *See Chaky v. State*, 651 So. 2d 1169 (Fla. 1995) (prior conviction); *White v. State*, 616 So. 2d 21 (Fla. 1993) (prior conviction); *Jorgenson v. State*, 714 So. 2d 423 (Fla. 1998) (prior conviction); *Woods v. State*, 733 So. 2d 980 (Fla. 1999) (prior conviction); *Knowles v. State*, 632 So. 2d 62 (Fla. 1993) (prior conviction); *Besaraba v. State*, 656 So. 2d 441 (Fla. 1995) (prior conviction); *Almeida v. State*, 748 So. 2d 922 (Fla. 1999) (prior conviction); *Green v. State*, 975 So. 2d 1081 (Fla. 2008) (prior conviction); *Proffitt v. State*, 510 So. 2d 896 (Fla. 1987) (felony murder); *Lloyd v. State*, 524 So. 2d 396 (Fla. 1988) (felony murder); *McKinney v. State*, 579 So. 2d 80 (Fla. 1991) (felony murder); *Sinclair v. State*, 657 So. 2d 1138 (Fla. 1995) (felony murder); *Thompson v. State*, 647 So. 2d 824 (Fla. 1994) (felony murder); *Rembert v. State*, 445 So. 2d 337 (Fla. 1984) (felony murder);

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unconstitutional, *see Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Court insists upon confining the instances in which the punishment can be imposed.") (emphasis added); *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973) (finding a "legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes"). The purpose of the statutorily defined facts that must be present before a death sentence is authorized is the same as the purpose of this Court's proportionality to review, i.e. guaranteeing that the death penalty is reserved for the worst of the worst.

*Caruthers v. State*, 465 So. 2d 496 (Fla. 1985) (felony murder); *Menendez v. State*, 419 So. 2d 312 (Fla. 1982) (felony murder); *Yacob v. State*, 136 So. 3d 539 (Fla. 2014) (felony murder and pecuniary gain merged); *Jones v. State*, 705 So. 2d 1364 (Fla. 1998) (felony murder and pecuniary gain merged); *Jones v. State*, 963 So. 2d 180 (Fla. 2007) (felony murder and pecuniary gain merged); *Songer v. State*, 544 So. 2d 1010 (Fla. 1989) (under sentence); *DeAngelo v. State*, 616 So. 2d 440 (Fla. 1993) (CCP); *Ballard v. State*, 66 So. 2d 912 (Fla. 2011) (CCP); *Klokoc v. State*, 589 So. 2d 219 (Fla. 1991) (CCP); *Offord v. State*, 959 So. 2d 187 (Fla. 2007) (HAC); *Smalley v. State*, 546 So. 2d 720 (Fla. 1989) (HAC); *Ross v. State*, 474 So. 2d 1170 (Fla. 1985) (HAC); *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990) (HAC); *Williams v. State*, 707 So. 2d 683 (Fla. 1998) (pecuniary gain); *Clark v. State*, 609 So. 2d 513 (Fla. 1992) (pecuniary gain); *Williams v. State*, 37 So. 3d 187 (Fla. 2010) (avoid arrest); *Hardy v. State*, 716 So. 2d 761 (Fla. 1998) (victim was law enforcement). The fact of the matter is that this Court has not generally found that a single aggravator—especially the prior conviction of a crime of violence or in the course of a felony aggravators—to be sufficient to authorize the imposition of a death sentence. A single aggravator is often not sufficient because it does not genuinely narrow the class of people eligible for a sentence of death as required by *Furman v. Georgia*. The statutory purpose of requiring a factual determination that sufficient aggravating circumstances exist to justify a sentence of death is to insure that the

requisite narrowing occurs in order to satisfy the requirements of *Furman v. Georgia*. *See Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008); *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973) (finding a "legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes").

13. Other illuminating precedent from this Court includes those decisions reversing judicial overrides. In *Jenkins v. State*, 692 So. 2d 893, 895 (Fla. 1997), this Court reversed a judicial override of a jury's life recommendation because "the jury could have concluded that [the prior conviction aggravating] circumstance was entitled to little weight." This Court found that this possibility gave the jury's life recommendation a reasonable basis and precluded an override. In other words, it was reasonable for a jury to determine that the presence of the previous conviction of a crime of violence aggravator was not sufficient to justify the imposition of a death sentence.

14. In *Hallman v. State*, 560 So. 2d 223, 226-27 (Fla. 1990) (emphasis added), this Court reversed a judicial override because "the jury may well have decided that, **although four aggravating factors were proved**, some were entitled to little weight." Thus, *Hallman* stands for the proposition that a jury's determination that four aggravating circumstances were insufficient to justify a sentence of death

was a reasonable basis for a binding life recommendation.[3]

15. In *Cochran v. State*, 547 So. 2d 928 (Fla. 1989), this Court reversed an override where the judge overrode the life recommendation on the basis of the defendant's conviction of a prior murder:

> We are mindful of the concerns raised by the dissent. Without question, the trial court was authorized to weigh in aggravation the fact that this defendant was convicted of a prior murder. However, this aggravating factor alone does not and cannot automatically nullify a jury's life recommendation, as the dissent suggests. This Court has directly held to the contrary. *Fead v. State*, 512 So. 2d 176 (Fla. 1987) (jury override improper despite prior murder conviction where mitigating evidence supported jury's life recommendation). Both judge and jury still must weigh this aggravating factor against the available mitigating evidence.
>
> Indeed, to suggest that death always is justified when a defendant previously has been convicted of murder is tantamount to saying that the judge need not consider the mitigating evidence at all in such instances. The United States Supreme Court consistently has overturned cases in which mitigating evidence was deliberately and directly ignored. *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v.*

[3] In *Hallman*, we know that a majority of the jurors voted for a life recommendation. If the conclusion that the four valid aggravating circumstances were weak and insufficient, was a valid basis for a life recommendation and rendered it binding on the sentencing judge, what about those jurors who in other cases were in the minority voting for a life recommendation because they believed that the aggravators were insufficient to justify the imposition of a death sentence? Had a unanimous jury vote been necessary, those jurors' conclusions that the aggravators were insufficient (recognized as valid in *Hallman*) would have mattered and precluded the imposition of a death sentence.

> *Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *Accord Woodson v. North Carolina*, 428 U.S. 280, 286-87, 96 S.Ct. 2978, 2982-83, 49 L.Ed.2d 944 (1976).

*Id*. at 932-33.

16. In *Burr v. State*, 576 So. 2d 278 (Fla. 1991), an override was affirmed on direct appeal because there was no mitigators, but the override was vacated and a new sentencing ordered after the U.S. Supreme Court remanded the case on the basis of *Johnson v. Mississippi* error. Following the remand, this Court ordered a new sentencing with the life recommendation intact because even though there were two aggravators this Court could not say whether the elimination of the improper *Johnson* evidence was harmless given the life recommendation.

17. In *Fuente v. State*, 549 So. 2d 652 (Fla. 1989), this Court reversed a judicial override that the judge had rendered on the basis of three aggravating circumstances. This Court concluded that the jury could reasonably have determined that there was insufficient aggravation to justify a sentence of death "[b]ecause the jury in this case could have reasonably based its recommendation on the fact that Salerno and the victim's wife would likely not be prosecuted for their participation in the murder, the override was improper." *Fuente*, 549 So. 2d at 659. *See also Brookings v. State*, 495 So. 2d 135, 143 (Fla. 1986) ("Since reasonable people could differ as to the propriety of the death penalty in this case, the jury's recommendation of life must stand.").

18. In order for Mr. Lambrix to meaningfully address whether harmless error is available as to *Hurst* error under the logic of *Neders v. United States*, in order to meaningfully address whether *Hurst* error is structural, in order to meaningfully address the harmfulness of *Hurst* error in his case in light of this Court's jurisprudence regarding whether to affirm death sentences in one aggravator cases and in light of this Court's jurisprudence in override cases, in order to address whether *Hurst* error is harmless under *Caldwell v. Mississippi*, Mr. Lambrix must first know what this Court finds *Hurst* error to be. What statutorily defined fact or facts must be found by a Florida jury for a death sentence to be authorized under Florida law. Of course, the touchstone of due process is notice and reasonable opportunity to be heard. The right to due process entails "'notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The issue of harmless error cannot be addressed meaningfully when the contours of the error are unknown. The cacophony of views as to what constitutes *Hurst* error expressed during last week's oral arguments leave the contours of the error to be determined. Accordingly, Mr. Lambrix most respectfully asks that this Court permit him to brief the question of harmlessness and its availability as to *Hurst* error once this Court has resolved what constitutes *Hurst* error and what a *Hurst* compliant proceeding looks like.

**WHEREFORE**, the Appellant/Petitioner respectfully requests that this Court afford him an opportunity to brief the availability of harmless error and whether the *Hurst* error is his case can be found harmless beyond a reasonable doubt once this Court resolves the threshold questions of what *Hurst* error is and what a proceeding free of *Hurst* error looks like.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true copy of the foregoing has been provided to: Scott A. Browne, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Road, Ste. 200, Tampa, FL 33607-7013, *Scott.Browne@myfloridalegal.com*; Capital Appeals Intake Box, *capapp@myfloridalegal.com*; via email service at *warrant@flcourts.org* this 12th day of February 2016.

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